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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1195

JAMES E. PENROD, *Petitioner*

v.

UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner herein respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the opinion that court rendered in this proceeding on November 29, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, dated November 29, 1979, has not yet been reported and a copy is attached to this petition, (Pet. App. 1a).

JURISDICTION

The opinion below was entered on November 29, 1979, (Pet. App. 1a). A timely petition for rehearing was denied on January 3, 1980, (Pet. App. 11a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the Fourth Amendment prevent the admission into evidence in a criminal trial of personal business books and records previously obtained from the personal possession of the defendant by compulsory process in the form of a subpoena duces tecum?

2. May a trial court in a criminal case, consistent with the right to a jury trial, direct a finding of guilt by peremptory instruction as to an essential element of the offense?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

United States Constitution, Amendment V:

> No person shall be . . . compelled in any criminal case to be a witness against himself, . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

United States Constitution, Article III § 2, cl. 3:

> The Trial of Crimes, except in Cases of Impeachment, shall be by Jury . . .

Internal Revenue Code of 1954 § 7206(1):

> Any Person who—
>
> (1) Declaration Under Penalties of Perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

18 U.S.C. § 17(c):

> For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT OF THE CASE

A. The Proceedings Below

Petitioner James E. Penrod was indicted February 7, 1978, on two counts of filing false tax returns, 26 U.S.C. § 7206(1), by a grand jury sitting for the Eastern District of Virginia. The indictment alleged Petitioner overstated deductions claimed for cost of goods sold in his federal income tax returns for 1973 and 1974.

Approximately two years prior to this indictment, a District of Columbia grand jury, conducting an investigation of the graphics industry, issued a subpoena duces tecum to the Petitioner, directing him to produce certain personal business and financial documents in his possession. The Petitioner complied with the subpoena.

When the government proposed to offer certain of these subpoenaed documents against Petitioner in the 1978 tax prosecution in Virginia,[1] he moved to suppress, contending such use violated his rights under both the Fourth and Fifth Amendments, as well as Federal Rule of Criminal Procedure 6(e) regarding grand jury secrecy. This motion was denied.

At trial, Petitioner defended on the grounds that the returns were neither false nor fraudulent; that the method of reporting the transactions in question was proper. Over strenuous objection, the trial court instructed the jury peremptorily that a return reporting cost of goods sold as Petitioner had done, was an untrue return, the effect of which permitted the court, not the jury, to decide the merits of Petitioner's defense. Predictably, Petitioner was convicted. He appealed his conviction to the United States Court of Appeals for the Fourth Circuit. A panel of three judges heard argument on July 13, 1979. On November 29, 1979, a decision to affirm was announced. A timely petition to rehear with a suggestion for rehearing en banc was denied by the same panel January 3, 1980. A copy of that denial order is attached, (Pet. App. 11a).

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[1] The United States District Court for the Eastern District of Virginia, Judge Albert V. Bryan, Jr. presiding.

B. The Relevant Facts

The facts regarding Petitioner's tax conduct were never in real dispute. The heart of the conflict centered on whether the conduct amounted to tax fraud.

In approximately 1970, Petitioner began a small graphic arts business called Techni-Graphic Services, an unincorporated sole proprietorship operated by Petitioner from his home. Before starting his own business, Petitioner had been employed for many years by Keuffel and Esser (K & E), a graphics firm.

In 1973 and 1974 two government employees, Jordan and Anderson, who were purchasing agents dealing with the graphic arts industry developed a scheme to embezzle government funds. They importuned persons at companies with whom they ordinarily did business to invoice the government for work not actually performed. Once the invoices were paid, Jordan and Anderson received the payments back as cash. Refusal to accede to this scheme meant a cut-off of legitimate government graphics work.

Jordan imposed his demands on one Meacham, a manager at K & E. Meacham for some reason could not fulfill Jordan's demands solely through K & E, so he called upon his former protegé, the Petitioner, to send invoices to K & E generating the cash which Meacham, would in turn pass onto Jordan. The Petitioner was involved in a similar scheme directly with Anderson.

Aside from being able to continue to do legitimate graphics work for the agencies by which Jordan and Anderson were employed, Petitioner did not profit financially from his participation in the kickback schemes.

To cover his transactions with Jordan and Anderson, Petitioner arranged with several subcontractors who did work for him to invoice him for the identical amount he had invoiced Anderson or K & E. He paid the subcontractors' invoices by check, and they later returned cash to Petitioner after deducting enough to pay taxes on their "income". Petitioner then passed the cash direct to Anderson or Meacham. Ironically, it was Petitioner who insisted to his subcontractors that taxes in fact be paid on all transactions, whether work was performed or not.

For tax purposes, Petitioner handled the transactions as if they were ordinary work orders. When he was paid for the invoices, he recognized that amount as gross income. When he paid his subcontractor, he deducted the payment along with all other payments to subcontractors as a cost of goods sold. He even reported the payments to the IRS on their form 1099, used to report payment of miscellaneous income to non-employees.

In 1976, the Justice Department started an investition of the graphics industry. Pursuant to that investigation, Assistant U. S. Attorney Richard E. Stuckey caused to be issued a grand jury subpoena directed to Petitioner, requiring him to deliver:

> All documents pertaining to any transaction with Keuffel and Esser for the periods 1973 to 1975 including, but not limited to invoices, requests for services, delivery receipts, other documentation relating to work or services performed for Keuffel and Esser, and all commercial bank records for the above time period.

Penrod complied with the subpoena, delivering all the described records in his possession to Stuckey, who marked the subpoena "satisfied—FAS, 3-30-76".

As a result of the investigation, Meacham, Jordan and Anderson were indicted and plead guilty to defrauding the government. The Justice Department elected not to prosecute Petitioner in connection with the schemes, presumably because his involvement was marginal and was essentially an accommodation to the principals which enabled him to continue to do legitimate business with the government. As he testified, "Unfortunately, that was the nature of the business. In order to get the business, this is what you had to do. It was something I don't think anybody wanted to do, but it seemed to be that is the way business was transacted".

However, instead of turning Petitioner's records back to him after completing their investigation, they were turned over to the IRS, which in turn used them as the basis for bringing this tax fraud case against Petitioner, almost three years later.[2]

Petitioner's defense was based upon the premise that he believed it was correct from a taxation standpoint to report the transactions as they were reported, and that therefore not only did he believe that the returns were true and accurate returns at the time he filed them, but that he still believed them to be true and accurate.

He explained that he included all the money he had received in his gross income statement, whether or

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[2] Penrod never testified before the grand jury, nor was he asked to.

not it was for work actually performed. When he paid money to his subcontractor, whether for work performed or not, he deducted the amount so paid, and reported it to IRS as income to the subcontractor on the 1099 form.

The government's position was that it was improper to deduct the money paid to the subcontractors unless actual work was performed. Thus, according to the government, to report payments to subcontractors as a deduction, and also on the form 1099 as income to the subcontractor, was an erroneous and fraudulent use of the 1099, and the deduction should not be taken, not because the money was not actually paid out, but because no work was actually performed.

The government produced no evidence, rule, regulation, statute or inference that payments made to subcontractors for the ultimate purpose of "laundering" funds for kickbacks was not a proper deduction. Only the judge's peremptory instruction to the jury (also with no apparent authority) provided this linch pin to the government's case.

After the trial court refused to suppress the documents obtained earlier via the grand jury subpoena, the government introduced many, consisting of invoices and checks, at Petitioner's trial, over his continued objection.

REASONS FOR GRANTING THE WRIT

In one remarkable decision, the Court of Appeals has overruled, *sub-silentio,* a century and a half of decisions of this court delineating Fourth Amendment

protection, and at the same time exponentially expanded a doctrine which conflicts with decisions of this Court, at least four other Circuits, and which virtually emasculates the right to trial by jury in federal criminal proceedings.

1. The Approval by the Court of Appeals of the Trial Court's Peremptory Instruction to the Jury on a Material Issue in a Criminal Case Conflicts With the Decisions of This Court, at Least Four Other Circuit Courts and the Plain Dictates of the Constitution.

The right of the trial court to partially or completely direct a jury's verdict in civil litigation has long historic validity and is present practice, without dispute. Just as clearly at least since the ratification of the Constitution, the same right does not exist in regard to criminal trials.

This Court has clearly stated that the constitutional right of a jury trial in a criminal case is an absolute, not a qualified, right. *Patton* v. *United States,* 281 U.S. 276 (1930). Thus, a judge may not direct a verdict of guilty, no matter how conclusive the evidence, *United Brotherhood of Carpenters and Joiners of America* v. *United States,* 330 U.S. 395 (1946).

Approximately fifteen years ago, the United States Court of Appeals for the Fourth Circuit in *Guy* v. *United States,* 336 F.2d 595 (1964), set forth a different doctrine. Reasoning that "there can be no 'issues of fact' where there is no controversy as to the facts", the Court of Appeals ruled that the trial judge was not invading the jury's province by instructing them that even though dismantled, a still was nonetheless a still.

The defendant in *Guy* earnestly contended that the evidence that the necessary parts had been removed and hidden nearly gave the jury the right to find that the still was not "in readiness for the commencement of the distilling of spirits", *United States* v. *Williamson,* 111 F. Supp. 411, 412 (E.D. Tenn. 1953) and thus, not a still within the meaning of the applicable criminal statute. The Court of Appeals answered this assertion by adopting a concept familiar to civil law but wholly new when applied to criminal prosecution. If the evidence was "not in conflict" as the Court of Appeals saw it, it became a "matter of law" for the court, and the jury could be peremptorily instructed on the matter.

It should have been earnestly hoped that *Guy* would have been considered a momentary lapse and would thenceforth be ignored or limited to its own facts. Not so. The case was later cited with approval in *United States* v. *Salliey,* 360 F.2d 699 (4th Cir. 1966).[3] Later, the Court of Appeals was asked in the absence of objection below, to overrule *Guy* and *Salliey,* but in a per curiam opinion declined to do so, saying only that the error was not so gross as to amount to plain error, *United States* v. *Baxley,* 406 F.2d 397 (4th Cir. 1969). The latter opinion does however note "the constitutional problem inherent in the withdrawal from a jury of any of the elements constituting a crime". *Id.* at 398.

Thus, *Guy* is not without implied, if not express, criticism within its own Circuit. In other Circuits, the

[3] It need not have been. *Salliey* dealt with a failure to instruct on a possible defense not raised, not, as here, a peremptory instruction that one of the essential elements of the crime had been established as a matter of law.

holding of *Guy* will find universal rejection. The principle that the judge may not take any issue, controverted or not, from the jury by peremptory instruction has been uniformly followed without deviation in at least four other Circuits.[4] The holding in *Guy* was expressly criticized by the Seventh Circuit in *United States* v. *England,* 347 F.2d 425, 431 (1965) stating "*Guy* ignores the traditional notion that a plea of not guilty by an accused to an indictment or information charging a criminal violation places 'in issue' all essential averments contained therein."

The further, staggering implication of the application of *Guy* to this case lies in the expansion of the principle that the Court may remove from the jury's consideration "uncontroverted" issues to the point where, as here, peremptory instruction was given on one of the trial's most contested issues.

The defense consistently took the position throughout the trial that the method of reporting by Petitioner was not only believed by him to be proper, but *was in fact* proper, rendering the return not a false return.

In opening statement counsel for the defense told the jury, "I submit to you it was a proper use of the form".

For ten full pages of transcript counsel for the defendant, counsel for the government and the trial court questioned the government's expert tax witness regarding whether the return, as filed, was in fact false.

[4] See, e.g., *Schwachter* v. *United States,* 237 F.2d 640 (6th Cir. 1956); *Carothers* v. *United States,* 161 F.2d 718 (5th Cir. 1947); *United States* v. *Manuszak,* 234 F.2d 421 (3rd Cir. 1956); *Konda* v. *United States,* 166 F. 91 (7th Cir. (1908).

It was defense counsel's intent to show (and a fair reading of the testimony would indicate successfully) that the return was a true return.

Petitioner testified that the reporting on the return was in accord with IRS instructions.

In closing argument counsel for the Petitioner argued for eight pages of transcript that the return was a true return only to have the trial court immediately thereafter summarily instruct that the return was "an untrue return."[5]

The issue of falsity became "uncontroverted" ("a matter of law, not fact") for the first time in the Opinion Below, (Pet. App. 10a).

The conflict between the Opinion Below and the Seventh Circuit goes even to the precise point involved in this case. *United States* v. *Raub,* 117 F.2d 312 (7th Cir. 1949). Raub was charged with willfully attempting to evade payment of a large part of his income and victory taxes by filing a false and fraudulent tax return. He had worked out an arrangement to defer taxes on profits by a complex scheme allegedly on advice of counsel and tax experts.

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[5] The government contends that the method of reporting was "uncontroverted" and therefore a matter for the court, not the jury. What this fails to address is that the additional and necessary conclusion that the return is false *was* controverted. In every tax case, the return as filed is "uncontroverted" in the sense that a given method of reporting income and taking deductions is used. This does nothing to answer the question as to whether the method of reporting renders the return false. At some points, the government seems to be asserting that the fact that actual work was not performed by the subcontractors rendered the returns false. No premise exists however for such a conclusion. Neither Statute, Rule, Regulation nor expert testimony supports this position, if indeed it is the government's position.

The court points out that the question of fraud was an essential issue in the case "and such question must be submitted to the jury under proper instructions; the court may not direct a verdict of guilty on it no matter how conclusive the evidence". *Id.* at 315.

The appellate court then examined the instructions of the trial court, and concluded that

> the fair interpretation of these instructions is that they assumed there was only one issue to be decided by the jury, namely, that of intent, and, in effect, they amounted to the direction of the verdict, on the issue of falsity and fraudulence. But this was not conceded by the defendant, and he was entitled to the jury's determination instead of having the issue taken from it. *Id.* at 316.

Indeed, the Seventh Circuit thought the error so fundamental that they ruled, "[W]e think this error so affects the substantial right of defendant as to warrant our noticing it in spite of his failure to call it to the attention of the trial court." *Id.* at 316.

The Fourth Circuit doctrine, if allowed to continue to expand, would dramatically extend the power of trial judges over verdicts of juries in federal criminal trials in a patently unconstitutional way.

Judges, like others, take great comfort from worthy intentions, and any means of directing a self-perceived "proper" result by a flanking maneuvor around the obstacle of jury consideration will be an irresistable siren call to many.

It is therefore imperative that this Court resolve the continuing conflict between the Fourth Circuit and the several other circuits and this Court as to whether citizens tried within the jurisdiction of the Fourth Circuit

Court of Appeals have the same unqualified right to a jury trial enjoyed by the balance of the citizenry.

2. Although Squarely Presented, the Opinion Below Fails to Deal With the Issue of Petitioner's Fourth Amendment Rights, the Effect of Which Is to Deprive Petitioner of Those Rights in Contravention of Decisions of This Court.

In his pretrial motion to suppress, Petitioner claimed that the admission into evidence of documents obtained by the government from his personal possession in response to a subpoena duces tecum violated his rights under the Fourth and Fifth Amendments. *Boyd* v. *United States,* 116 U.S. 616 (1886). The motion was overruled, essentially without opinion.[6]

On appeal, Petitioner's first presented question was:

1. May personal and business records obtained from the possession of a person by compulsory process, namely a grand jury subpoena, be later used against the person in a subsequent criminal proceeding over his objection based upon his rights pursuant to the Fourth and Fifth Amendments?

Petitioner's first argument summary stated:

> APPELLANT CONTENDS THAT SEIZURE OF HIS PERSONAL RECORDS PURSUANT TO THE GRAND JURY SUBPOENA AND THEIR LATER USE AGAINST HIM IN A CRIMINAL PROCEEDING VIOLATED THE FOURTH AMENDMENT PROSCRIPTION AGAINST ILLEGAL SEIZURES . . . .

[6] In brief remarks from the bench in overruling, Judge Bryan did not mention either Fourth or Fifth amendment consideration raised by Petitioner.

In support of his position, Petitioner cited *Boyd* v. *United States, supra, United States* v. *Miller,* 425 U.S. 435 (1976) and *Fisher* v. *United States,* 425 U.S. 391 (1976).

Glancing through the Opinion Below, it is immediately clear that the issue of Fourth Amendment protection is nowhere even mentioned. The Opinion does assert that a compliance with the subpoena duces tecum constitutes a waiver of *Fifth* Amendment right to remain silent,[7] but simply ignores the fact that records were seized by the government under compulsory process without a warrant issued on probable cause, and introduced at trial over Petitioner's objection.

On petition for rehearing, with suggestion for en banc consideration, Petitioner pointed out the failure of the Court of Appeals to address the Fourth Amendment issue. That petition was dismissed as "without merit." (Pet. App. 11a).

Conceding arguendo that Fifth Amendment protection may be waived by voluntary appearance and testi-

[7] The opinion below states that "the defendant voluntarily delivered the documents to the grand jury . . ." in effect holding that a subpoena duces tecum is without compulsion, compliance therewith being a "voluntary" act, directly contrary to this court's recent holding in *Fisher* v. *United States, supra,* that a subpoena duces tecum amounts to substantial compulsion. We are mindful that this Court does not ordinarily exercise its certiorari jurisdiction to simply correct mere errors of a lower court decision. *Ross* v. *Moffitt,* 417 U.S. 600. However, one must pender when such rulings of the Court of Appeals on Petitioner's Fifth Amendment rights and his "waiver" thereof exceed "mere error" and approach denial of Due Process. Nonetheless, it seems that the rulings of the Court of Appeals limiting the right to jury trial and refusing to address the Fourth Amendment issue more emphatically demand the exercise of this Court's certiorari jurisdiction.

mony before the grand jury, the same rule clearly does not apply to the production of documents pursuant to a subpoena duces tecum. The Court of Appeals asserts "[W]e can discern no difference between oral testimony given to a grand jury and documents presented to a grand jury pursuant to a subpoena". Suffice it to say that this Court from *Boyd* in 1816 to the present has repeatedly discerned a difference.[8]

Indeed, the difference discerned is crucial. If consideration is given to Petitioner's claims of Fourth Amendment violations, affirmance cannot arguably result. Even if the Court of Appeals' opinion were correct that compliance with the subpoena waived Fifth Amendment rights, no such conclusion can be reached as to the exclusionary rule regarding evidence seized in violation of the Fourth Amendment.

This Court has clearly held that the exclusionary rule does not apply to grand jury proceedings; that "the incentive to disregard the requirement of the Fourth Amendment totally to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim." *United States* v. *Calandra,* 414 U.S. 338, 351 (1974).[9]

It ought to clearly follow that one cannot waive a right (to refuse to produce documents in answer to a

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[8] Compare, e.g. *United States* v. *Miller, supra,* and *United States* v. *Fisher, supra,* with *Garner* v. *United Staes,* 424 U.S. 648 (1976).

[9] The same principle is enunciated apparently applicable to both Fourth and Fifth Amendment issues, in dicta in *United States* v. *Blue,* 384 U.S. 251 (1966).

grand jury subpoena) that one does not have (or more accurately, cannot raise). This Court in *Calandra* has set out the path for one in Petitioner's position to follow: since the grand jury has a right to consider even illegally seized evidence, compliance with the subpoena is required; the place to raise Fourth (and Fifth) Amendment rights is after criminal charges are brought. This is precisely what Petitioner did. The Opinion Below is utterly silent on this critical portion of Petitioner's argument in favor of suppression. To consider the point is to require reversal. To fail to consider the issue is to deprive Petitioner of the benefit of the right *sub silentio.*

This Court has held that a subpoena duces tecum is not equivalent to a search warrant. *Mancusi* v. *DeForte,* 392 U.S. 364 (1968). While stating that the Fourth and Fifth Amendment protection of *Boyd* does not extend to bank records [10] or work sheets of defendant's accountant,[11] no decision has overruled *Boyd* that private papers in the hands of an individual may not be seized other than by a valid search warrant.[12] Indeed, Mr. Justice Brennan in a separate opinion in *Fisher, supra,* writes that "[any] implication that the privilege might not protect against compelled production of tax records . . . is . . . contrary to settled constitutional jurisprudence." *Fisher, supra* at 415.

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[10] *United States* v. *Miller, supra.*

[11] *Fisher* v. *United States, supra.*

[12] *Anderson* v. *Maryland,* 427 U.S. 463 (1976).

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-5125

UNITED STATES OF AMERICA, *Appellee*

v.

JAMES E. PENROD, *Appellant*

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., District Judge.

Argued: July 13, 1979 Decided: November 29, 1979

Before RUSSELL, Circuit Judge, FIELD, Senior Circuit Judge, and WIDENER, Circuit Judge.

Thomas P. Mains, Jr., for Appellant; Leonie Brinkema, Assistant United States Attorney (William B. Cummings, United States Attorney on brief) for Appellee.

WIDENER, Circuit Judge:

The defendant, James E. Penrod, was convicted by a jury on two counts of knowingly filing a false tax return in violation of 26 U.S.C. § 7206(1).[1] Prior to trial, the defendant moved to suppress certain evidence of personal and business financial records that the government had ob-

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[1] 26 U.S.C. § 7206(1):

> Any person who . . . [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

The court sentenced the defendant to six months on each count, with the terms to run concurrently.

tained from him pursuant to a grand jury subpoena. The district court denied the defendant's motion, and the defendant cites that ruling as error on appeal. The defendant also challenges one aspect of the trial court's instructions to the jury. We affirm.

In late 1969 or early 1970, the defendant began a small graphic arts business named Techni-Graphic Services. This business was an unincorporated sole proprietorship that the defendant operated out of his home. Prior to forming the business, the defendant had been employed for many years by Keuffel and Esser (K&E), a graphics firm.

During 1973 and 1974, the defendant became involved in an kickback scheme in the graphics industry. A government employee, Robert A. Jordan, developed a scheme whereby he embezzled unexpended funds left in his department's budget. He requested that K & E send him an invoice for work not done or ordered. Tyrus Meacham, the general manager of K & E, in turn requested the defendant to invoice K & E for work not done, or to overbill for work done. K & E would then pay the defendant for the invoiced work.

The defendant, to cover his transaction with K & E, set up a similar arrangement with several subcontractors who did work for him. The subcontractors invoiced the defendant, he says in the amount for which he had invoiced K & E, for work that was not performed. The defendant then paid the subcontractors by check, and instructed them to return to him the cash after deducting an amount sufficient to cover their increased taxes from the additional income. The defendant then deducted enough to cover his increased taxes, if any, on the arrangement, and transferred the cash to Meacham, who in turn paid Jordan. The defendant also was involved directly in a similar scheme with another government employee, Carl E. Anderson. The defendant did not profit financially from his participation in the kickback schemes.

The defendant for tax purposes handled the transactions as if they were ordinary orders for work actually to be performed. When he was paid for his invoice, he recognized that amount as gross income. The defendant reported those payments he made to the subcontractors as a deduction on form 1099 for the cost of goods sold. The defendant did not reflect in any way on his books or tax returns the cash he received back from the subcontractors and passed on to Meacham and Anderson.

During 1976, the Justice Department instituted a joint tax and fraud investigation of the graphics industry. The investigation was a joint one in which the United States Attorneys in the Eastern District of Virginia and the District of Columbia participated.[2] On March 12, 1976, a grand jury sitting in the District of Columbia in connection with the investigation issued a subpoena directing the defendant to produce

> [a]ll documents pertaining to any transaction with Keuffel and Esser for the periods 1973 and 1975, including, but not limited to invoices, requests for services, delivery receipts, other documentations relating to work or services performed for Keuffel and Esser, and all commercial bank records for the above time period.

The defendant obeyed the subpoena and apparently cooperated with the government. He delivered the requested

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[2] The district court held a hearing on the defendant's motion to suppress the evidence. At that hearing, neither side presented evidence and the court acted on the statements of the attorneys for both the defendant and the government. The government's attorney indicated that the government had instituted "a joint tax criminal investigation" in the Eastern District of Virginia and the District of Columbia. Because the defendant has presented no evidence to the contrary, we accept that statement of fact, as we do the statement of facts of the defendant's attorney at the hearing.

documents to Assistant United States Attorney Richard E. Stuckey on March 30, 1976. As a result of that investigation Meacham, Jordan, and Anderson were indicted by another grand jury and pled guilty to charges of defrauding the government.[3] The Justice Department did not prosecute the defendant in connection with the fraud aspects of the kickback schemes.[4]

Subsequently, the checks and invoices, rather than being returned to the defendant after the completion of the fraud investigation, were turned over to agents of the Internal Revenue Service, which used them as a basis for bringing this tax fraud case against the defendant. An I.R.S. agent later presented the documents to a grand jury sitting in the United States District Court for the Eastern District of Virginia. So far as we can tell from the record, the government attorneys failed to obtain a court order authorizing the transfer of the documents to either the I.R.S. or the federal grand jury sitting in Virginia. Nor does it appear that the District of Columbia court was ever informed of the transfer of the documents to the I.R.S.

On December 6, 1977, the grand jury sitting in Virginia returned an indictment against the defendant, charging him with two counts of tax fraud. The indictment alleged that he knowingly understated his income for the years 1973 and 1974. Prior to trial, the government voluntarily dismissed the indictment, and on February 7, 1978, an indictment was returned in open court alleging that the defendant had overstated his deductions claimed for the cost of goods sold on his returns for the same years. This latter was the indictment on which the defendant was tried.

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[3] The grand jury to which the defendant delivered the documents failed to return an indictment against anyone. Another grand jury returned the indictment against Meacham, Jordan, and Anderson.

[4] The record does not indicate that the Justice Department made any promise to the defendant not to prosecute him in connection with the kickback schemes.

Prior to trial, the defendant moved to suppress the documents that he had presented to the District of Columbia grand jury. The defendant argued unsuccessfully that use of the documents violated his fourth and fifth amendment rights, and that the government had violated Federal Rule of Criminal Procedure 6(e) in turning over the documents to the I.R.S. and the Virginia grand jury without obtaining court approval.

After the evidence was in, the court, over the objection of the defendant, instructed the jury that an income tax return reporting cost of goods sold as the defendant had done was an untrue return.

The jury convicted the defendant on two counts of subscribing to false tax returns, from which conviction this appeal followed.

The defendant challenges the ruling of the district court denying his motion to suppress the documents that the government had obtained by his compliance with the subpoena issued by the grand jury sitting in the District of Columbia. These documents can be divided into two major categories. One group contains the cancelled checks that the defendant had given to the subcontractors as payment for unperformed work. The other group contains the invoices that the subcontractors had given to the defendant, representing the unperformed work and the charges for that work. The record does not indicate that anyone other than the defendant had access to these invoices after he received them from the various subcontractors.

Although we assume without deciding that the defendant could have declined to deliver the invoices in response to the District of Columbia grand jury subpoena,[5] we hold

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[5] *Bellis* v. *United States*, 417 U.S. 85, 87-88 (1974): "The privilege [against self-incrimination] applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life." *Boyd* v. *United States*, 116 U.S. 616 (1816) is on

that he waived any Fifth Amendment right he may have possessed. The defendant voluntarily delivered the documents to the grand jury, and the record contains no indication that the defendant raised an objection to the subpoena at that time. We note that the defendant was represented by counsel at the time he complied with the subpoena.

That a witness before a grand jury is entitled to invoke the privilege against self-incrimination is beyond dispute. *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). Also beyond dispute is that a person must invoke such a right, and the failure to do so forecloses him from invoking the privilege. The information he furnishes may be later introduced as evidence against him in a criminal proceeding. See *United States* v. *Mandujano*, 425 U.S. 564, 574-75 (1976); *Garner* v. *United States*, 434 U.S. 141 (1931). Cases from other jurisdictions have held that if a person voluntarily chooses to testify before a grand jury, his testimony is admissible at the trial of the case against him. *United States* v. *Capaldo*, 402 F2d 821, 823-824 (2d Cir. 1968), cert. denied, 394 U.S. 989 (1969); *United States* v. *Alaimo*, 297 F2d 604, 607 (3rd Cir. 1961), cert. denied, 369 U.S. 817 (1962). We can discern no difference between oral testimony given to a grand jury and documents presented to a grand jury pursuant to a subpoena. If the defendant had claimed the Fifth Amendment privilege before the District of Columbia grand jury, he certainly would have placed that fact before us, which he has not done. Thus, we assume he did not claim the privilege and hold that by failing to invoke the privilege against self-incrimination at the time he de-

point. *Boyd* protects against the "compulsory production of a man's private papers to establish a criminal charge against him." Id. at 622. *Boyd* was concerned with an invoice, the same kind of document involved in this case. We also assume without deciding that the government could have compelled the defendant to produce the checks. See *United States* v. *Miller*, 425 U.S. 435 (1976), where the Court emphasized that it could "perceive no legitimate 'expectation of privacy'" in checks. Id. at 442.

livered the documents to the grand jury, the defendant waived any such privilege he may have possessed not to comply with the subpoena.[6]

The defendant's contention that the government violated Federal Rule of Criminal Procedure 6(e), and thus the documents should have been suppressed, is also without merit. Rule 6(e) reads in pertinent part:

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a[n] . . . attorney . . . may disclose matters . . . only when so directed by the court preliminarily to or in connection with a judicial proceeding.[7]

[6] Neither the Supreme Court, *United States* v. *Washington*, 431 U.S. 181, 190 (1977), nor this circuit has determined whether a potential defendant before a grand jury must be given warnings regarding his Fifth Amendment rights, and the record does not indicate whether such warnings were given the defendant in this case. The defendant failed, however, to make such a claim either at the suppression hearing or on appeal to this court. Thus, we need not address the question.

[7] Congress amended Rule 6(e), effective October 1, 1977. The amendment allows a government attorney, without the requirement of obtaining a prior court order, to disclose matters occurring before a grand jury to, for example, agents of the I.R.S. or F.B.I. so that the agents may assist the government attorney in his investigation of federal criminal law. See S. Rep. No. 95-354, 95th Cong., 1st Sess., reprinted in (1977) U.S. Code Cong. & Admin. News, pp. 527, 530-32. The amended rule recognizes the need of government attorneys and the grand jury to utilize the services of other government employees.

This exception, however, is subject to the qualifications that the agents' names and a description of the materials disclosed be provided to the district court. See *In re Grand Jury Subpoenas, April 1978, at Baltimore*, 581 F2d 1103 (4th Cir. 1978), cert. denied, 99 S. Ct. 1533 (1979).

The record does not indicate the dates when the documents were first handed over to the I.R.S. and when they were later presented

This rule confirms the long-established policy of maintaining the secrecy of grand jury proceeding. *Dennis* v. *United States,* 384 U.S. 855, 869 (1966); *United States* v. *Johnson,* 337 F2d 180, 197 (4th Cir. 1964), aff'd, 383 U.S. 169, cert. denied, 385 U.S. 846, 385 U.S. 889 (1966). One important reason for this desire to maintain secrecy is "to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes." *United States* v. *Johnson,* 337 F2d at 197, n.25 (quoting *United States* v. *Rose,* 215 F2d 617, 628-29 (3rd Cir. 1954)).

The grand jury minutes are not the property of the attorneys or agents of the government. Rather, these documents are records of the court. *United States* v. *Proctor & Gamble Co.,* 356 U.S. 677, 684-85 (1958) (Mr. Justice Whittaker, concurring). Documents produced pursuant to a grand jury subpoena remain the property of the person producing them, and they may be revealed to persons other than the grand jury and the prosecuting attorneys only upon the consent of the owner of the documents or upon a court order. *United States* v. *Interstate Dress Carriers, Inc.,* 280 F2d 52, 54 (2d Cir. 1960).[8]

We find however, no error in the use by the government of the documents delivered to the United States Attorney for the District of Columbia. The investigation was a joint

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to the grand jury in Virginia. Given that the defendant complied with the subpoena issued by the District of Columbia grand jury 18 months prior to the effective date of the amendment, and given that the Virginia grand jury returned its indictment only one month after the effective date of the amendment, to give the defendant the benefit of the doubt we assume that Rule 6(e) prior to its amendment applies to this case. We do not decide what effect, if any, the amendment would have on this case, but it would be no more favorable than the rule prior to the amendment.

[8] Generally, only the court that has jurisdiction over the grand jury has the authority to direct disclosure of the grand jury minutes or documents. See *In re Grand Jury Investigation of Banana Industry,* 214 F. Supp. 856 (D. Md. 1963); C. Wright, *Fed. Prac. & Proc.* § 106, at 174 (1969).

investigation of criminal and tax matters participated in by both United States Attorneys' offices. We think that when the papers came into the hands of either United States Attorney involved in the investigation, that was the equivalent of delivery to both of them. And, when the United States Attorney for the Eastern District of Virginia had the papers in his possession, and subject to no Fifth Amendment claim, he had the right to turn them over to the I.R.S. to develop the case. While it is true that we have said that a motion to suppress may be well argued for violation of Rule 6(e), see *In re Grand Jury Subpoenas, April 1978, at Baltimore,* 581 F2d 1103, n. 6 (4th Cir. 1978), cert. den., 99 S.Ct. 1533 (1979), we think the rule does not require suppression here for the United States Attorney for the Eastern District of Virginia received the papers in the course of the investigation of the matter at hand. See *United States* v. *Garcia,* 420 F2d 309 (2d Cir. 1970). Cf. *United States* v. *E. H. Koester Bakery Co.,* 334 F.Supp. 377 (D. Md. 1971).

The defendant also argues that the trial court's instruction to the jury on the elements of the offense with which he was charged directed a finding of guilt on the issue of falsity and thus is reversible error. The trial court instructed the jury as follows:

> You have heard a good deal of testimony and argument concerning the 1099 form. You are told that even though the 1099 form accurately reflected the actual amount paid to persons such as Rudy or Cummings, or Lam, the defendant cannot deduct amounts as cost of labor, even though they were included in those 1099 forms in those amounts, and to the extent that those amounts were paid to persons with the understanding that those amounts would be repaid to the defendant, and which were actually repaid to the defendant.
>
> And this is so regardless of what he may have done with the money after it was so repaid to him. And a

return which undertakes to deduct such amount—that is, amounts which were returned to him on an understanding that they would be returned to him—a return which undertakes to deduct such amounts is an untrue return.

We do not think the district court erred in this case. Whether the return was true or not true was a matter of law, not fact, because the defendant testified as to how he took the deductions, and the district court accepted this fact in its instruction. There was no issue of fact on that point. *Guy* v. *United States,* 336 F2d 595 (4th Cir. 1964). The issues of fact were whether the defendant willfully filed the untrue return, believing it to be untrue, which issues were submitted to the jury.

Accordingly, the judgment of conviction is *AFFIRMED.*

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-5125

UNITED STATES OF AMERICA, *Appellee*

v.

JAMES E. PENROD, *Appellant*

ORDER

There being no request for a poll of the court on the petition for rehearing en banc,

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Russell and Judge Field.

/s/ H. E. WIDENER, JR.
For the Court

Supreme Court, U. S.
FILED
APR 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-1195

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES E. PENROD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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JAMES E. PENROD, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges his conviction for filing false tax returns, alleging that the trial court improperly directed a partial guilty verdict and that his Fourth Amendment rights were violated by the use of evidence which had been obtained from him by a grand jury subpoena duces tecum. There is no merit to either of these claims.

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on two counts of filing false tax returns for the years 1973 and 1974, in violation of Section 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C. 7206(1)). Petitioner was given concurrent six-month sentences on the two counts. The court of appeals affirmed (Pet. App. 1a-10a).

The indictment charged that petitioner had overstated deductions for cost of goods sold on his 1973 and 1974 income tax returns. In late 1969 or early 1970, petitioner had begun operating a small graphic arts business. Prior to forming the business, petitioner had been employed for many years by Keuffel and Esser (K & E), a graphics firm. During 1973 and 1974, petitioner became involved in a kickback scheme in the graphics industry. The salient feature of petitioner's participation in the scheme was that his firm would invoice K & E for work not done or overbill it for work performed. K & E would then pay petitioner for the invoiced work. Petitioner, in turn, would have his subcontractors overcharge him for subcontracted work. When petitioner paid the subcontractors by check, they returned to him the cash after deducting an amount sufficient to cover their increased taxes from the additional income. Petitioner then deducted enough to cover his increased taxes due to the scheme, if any, and transferred the cash to Meacham, the general manager of K & E, or Anderson, another party to the scheme.

When petitioner was paid for his invoices, he recognized those amounts as gross income. When he paid his subcontractors, he deducted the payments as costs of goods sold and reported them on 1099 forms as income to the subcontractors. Petitioner did not, however, reflect in any way on his books or tax returns the cash he received back from his subcontractors and passed on to Meacham and Anderson.

The evidence against petitioner included, *inter alia*, certain of his business records, which had been obtained by use of a grand jury subpoena duces tecum. Petitioner

made no objection to the subpoena when it was served on him, and complied with it (Pet. 4, 7). Prior to trial, petitioner moved to suppress the records on the ground, *inter alia*, that their use against him violated his Fourth Amendment rights.

1. Petitioner contends (Pet. 9-14) that the trial court's instruction to the jury on the elements of the offense with which he was charged directed a finding of guilt on the issue of the falsity of the return and thus constitutes reversible error. The trial court instructed the jury as follows (Pet. App. 9a-10a):

> You have heard a good deal of testimony and argument concerning the 1099 form. You are told that even though the 1099 form accurately reflected the actual amount paid to persons such as Rudy or Cummings, or Lam [the subcontractors], the defendant cannot deduct amounts as cost of labor, even though they were included in those 1099 forms in those amounts, and to the extent that those amounts were paid to persons with the understanding that those amounts would be repaid to the defendant, and which were actually repaid to the defendant.
>
> And this is so regardless of what he may have done with the money after it was so repaid to him. And a return which undertakes to deduct such amount—that is, amounts which were returned to him on an understanding that they would be returned to him—a return which undertakes to deduct such amounts is an untrue return.

The question of whether a return is true or untrue under a given set of facts is a question of law on which the trial court is required to instruct the jury. *Lisansky* v. *United States*, 31 F. 2d 846, 851 (4th Cir. 1929), cert. denied, 279 U.S. 873 (1929); cf. *Cooley* v. *United States*, 501 F. 2d 1249, 1253-1254 (9th Cir. 1974). In the present case, the trial court properly instructed the jury on the law—that a return on which deductions are taken for amounts paid out by the taxpayer, but returned to him on an understanding that they would be returned to him, is an untrue return regardless of what the taxpayer may have done with the money after it was repaid to him.[1] This left to the jury the factual issue of how the transactions had been reported on the tax returns and of petitioner's wilfullness. Since the trial court did not instruct the jury how any facts should be determined or withdraw any questions of fact from its consideration, this case presents no conflict with the cases relied on by petitioner.[2]

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[1]The instruction was clearly an accurate statement of the law. Section 7206(1) is violated by even the failure to report income which is offset by *deductible* expenses. *United States* v. *Taylor*, 574 F. 2d 232 (5th Cir.), cert. denied, 439 U.S. 893 (1978); *United States* v. *Williams*, 573 F. 2d 284 (5th Cir. 1978).

Moreover, even if petitioner's kickback expenditures were deductible, he violated Section 7206(1) by intentionally misrepresenting the nature of the deductible expenses. See *United States* v. *DiVarco*, 484 F. 2d 670 (7th Cir. 1973), cert. denied, 415 U.S. 916 (1974).

[2]In *United States* v. *Raub*, 177 F. 2d 312 (7th Cir. 1949), an action for the willful attempt to evade income taxes by the filing of a false and fraudulent return, the trial court had withdrawn from the jury the factual issue of the manner of the reporting itself. Factual issues were also withdrawn from jury consideration in *United States* v. *England*, 347 F. 2d 425 (7th Cir. 1965), *Schwachter* v. *United States*, 237 F. 2d 640 (6th Cir. 1956), *United States* v. *Manuszak*, 234 F. 2d 421 (3d Cir. 1947) and *Konda* v. *United States*, 166 F. 91 (7th Cir. 1908).

Even if, as petitioner contends (Pet. 9-14), *Guy* v. *United States*, 336 F. 2d 595 (4th Cir. 1964), conflicts with the cases on which he relies because the appellate court in *Guy* permitted the withdrawal of a factual issue from the jury, that conflict is not presented by this case, since here no factual issue was withdrawn from the jury.

2. Petitioner also claims that the use at trial of his business records, obtained from him by a grand jury subpoena, violated his Fourth Amendment rights (Pet. 14-17). Petitioner's sole claim is that, according to *Boyd* v. *United States*, 116 U.S. 616 (1886), "private papers in the hands of an individual may not be seized other than by a valid search warrant" (Pet. 17). Obtaining records by a subpoena duces tecum, however, involves neither a search nor a seizure. To the extent that *Boyd* may have suggested otherwise, that suggestion has long since been overruled. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 195, 202-209 (1946); *Wilson* v. *United States*, 221 U.S. 361, 375-376 (1911); *Hale* v. *Henkel*, 201 U.S. 43, 73 (1906).

The only Fourth Amendment constraint upon a subpoena duces tecum is that it not be so indefinite or so broad as to be unreasonable. *Oklahoma Press Publishing Co.*, *supra*, 327 U.S. at 208; *Hale*, *supra*, 201 U.S. at 76-77. Petitioner is not claiming and, in light of its specificity and narrowness, cannot claim that the subpoena at issue was unreasonable. In any event, having failed to challenge the subpoena at the time it was served upon him, petitioner waived any possible objection that the subpoena was unreasonably broad, indefinite, or burdensome.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

APRIL 1980